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Brf. of Outhwaite & Linn for D.

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Supreme Court of the United States.

(October Term, 1899.)

JOHN JOYCE, *Plaintiff in Error*,

vs.

H. F. AUTEN, Successor of STERLING COCKRILL, as Receiver of the First National Bank of Little Rock, Arkansas, *Defendant in Error*.

In Error to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF CASE.

The petition filed in the Court below was an ordinary declaration upon a promissory note made and executed by James E. Joyce & Co., of Little Rock, Arkansas, and John Joyce, plaintiff in error, dated at Little Rock, Arkansas, March 20th, 1893, due three years after date and payable to the order of C. H. Whittemore, as receiver of the McCarthy-Joyce Co. This note was, by said Whittemore, as such receiver, duly endorsed and assigned to the Receiver of the First National Bank of Little Rock, Arkansas, before maturity, and is sued upon by the defendant in error, Sterling J. Cockrill, who was at the date of the commencement of this action, the duly appointed Receiver of said First National Bank. An answer was filed in the Court below by plaintiff

in error, Joyce, to which answer the defendant in error demurred, and his demurrer was sustained by his Honor, Judge SAGE. Afterwards, on March 5th, 1898, plaintiff in error filed an amended answer, to which amended answer a demurrer was also filed. This demurrer was likewise sustained by his Honor, Judge SAGE, and plaintiff in error thereupon not desiring to further amend, judgment was rendered in favor of defendant in error against John Joyce, plaintiff in error, for eleven thousand and six dollars and seventy-five cents ($11,006.75) and costs of suit, upon March 5th, 1898.

From this judgment plaintiff in error prosecuted error to the United States Circuit Court of Appeals for the Sixth Circuit, and such proceedings were had therein, that, on the 7th day of March, 1899, a judgment was rendered in said Court, affirming the judgment of said Circuit Court.

After the commencement of said proceeding in error in the Circuit Court of Appeals, Sterling J. Cockrill ceased to be Receiver for said First National Bank of Little Rock, Arkansas, and one, H. F. Auten, was duly appointed as his successor as such receiver, and is now acting as such. And by stipulation of the parties herein (See Record, page 35), is defending this action in error, as successor to said Sterling J. Cockrill.

From the judgment of the Circuit Court of Appeals, plaintiff in error now prosecutes error in this Court. The issue joined is upon facts set out in the petition and in the amended answer of Joyce.

STATEMENT OF FIRST DEFENSE.

Two defenses are set out. The first is, in substance, that the plaintiff in error, Joyce, signed the note in controversy as surety only for the firm of James E. Joyce & Co., and upon the express agreement and understanding that the conditions under which he so signed as surety, *as such conditions are set*

out in the first defense, should be fully complied with. These conditions the defense alleges to have been that prior to the execution of the note, the McCarthy-Joyce Co., a trading corporation of Arkansas, made an assignment of all its property to one, C. H. Whittemore; that the First National Bank of Little Rock, Arkansas, being a preferred creditor of said McCarthy-Joyce Co., for a very large amount, accepted said assignment according to its terms, and thereupon applied to the proper Court of Arkansas to have said assignee, Whittemore, appointed receiver of said property of the McCarthy-Joyce Co., so assigned. That upon said application, Whittemore was appointed such receiver, and immediately took possession, as receiver, of the property theretofore assigned. That thereafter, by agreement of the First National Bank and all parties interested, said receiver was directed to sell all the real and personal property of the McCarthy-Joyce Co., in his hands, and that he did so sell said property on the 20th day of April, 1893, to James E. Joyce & Co., who, as part of the purchase money for said property, executed the note sued upon, with other notes. It is further alleged, that at the time of the sale it was by the Court ordered that the receiver, in addition to obtaining sureties upon the notes given for the deferred payments for said property, was to reserve a lien upon all of the real property so sold in accordance with the statutes of Arkansas, and that the plaintiff in error, knowing that the property sold was more than sufficient in value to meet the deferred payments, including the note sued upon, and relying upon the reservation of said lien by the receiver, became surety upon the note. The defense further alleges, that the receiver, Whittemore, failed to so reserve a lien upon property sold as ordered by the Court, and that he conveyed the same to James E. Joyce & Co., unencumbered, and that said James E. Joyce & Co. have since sold nearly all of the real estate so conveyed to inno-

cent parties, thereby, it is alleged, releasing the lien ordered to be retained by the Court, to the damage of plaintiff in error; said property so sold being alleged to have been sufficient in value to have paid all of the deferred payments to the receiver. It is further alleged, that the First National Bank of Little Rock, Arkansas, received the note sued upon, with notice of the facts, and "that the said note was transferred to the plaintiff herein, without any consideration being paid therefor, but for the sole purpose of transferring said note to plaintiff, as the successor in interest of the said former receiver of the said First National Bank of Little Rock." The record shows an endorsement of interest received by the First National Bank before the maturity of the note sued upon, and there is no allegation in the amended answer that the note was not transferred before maturity.

STATEMENT OF SECOND DEFENSE.

The second defense, in substance, alleges that at the time of the assignment of the McCarthy-Joyce Co. to C. H. Whittemore, certain promissory notes, at that time the property of said McCarthy-Joyce Co., were in possession of the First National Bank of Little Rock, Arkansas, for collection; that in the inventory of the property so assigned said notes were scheduled as the property of the McCarthy-Joyce Co. in the possession of said Bank for collection. That the First National Bank accepted said assignment according to its terms, and applied to the proper Chancery Court to have said Whittemore appointed receiver of all of the assets of the McCarthy-Joyce Co. That said Whittemore immediately qualified as such receiver and took possession of said assets. That by order of the Chancery Court appointing him as such receiver, he was directed to sell all the property, including said notes, and that in pursuance of said order he did sell said notes for the specified sum on the 20th day of April,

1893. That said sale was private, and the Chancery Court ordering the appointment of such receiver, thereupon directed him to deliver to the purchasers at said sale of stock of goods so sold and the choses in action, including the notes set out in said second defense; that the said Bank, before said sale, became insolvent, and one Roots was appointed its receiver and demand made upon him as such receiver for said notes by the purchasers at said sale, James E. Joyce & Co., and for the proceeds of such as had been collected, which demand was refused. That thereafter one Armstrong was appointed receiver of said Bank to succeed said Roots, and like demand was made upon him and refused. That said Armstrong resigned as such receiver and the plaintiff below, Cockrill, was thereupon appointed receiver of said Bank, and like demand made upon him and refused. That the plaintiff in error, Joyce, signed said note for James E. Joyce & Co., as surety, on the understanding and faith that the receiver of said Bank would deliver to the principal makers of said note the promissory notes set out in the answer. That said notes were more than sufficient in value to pay the note sued upon, together with another note of like amount representing the balance of the unpaid purchase money at said sale. That by the refusal to deliver said notes or the proceeds of such as had been collected, the consideration for the note sued upon, so far as Joyce was concerned, has failed, and plaintiff in error is entitled to its cancellation and surrender.

ARGUMENT.

FIRST DEFENSE.

The attempt of the first defense is to show that the Bank was not an innocent holder of the note sued upon for value, and that Joyce, as surety, is entitled to relief for the reason that Whittemore, the Receiver of the McCarthy-Joyce Co.,

neglected to retain a lien on certain real estate as he was ordered by the Court to do, and that the real estate having passed into the hands of innocent holders, the surety is deprived of any benefit therefrom. It is not questioned by the pleadings, but on the contrary it affirmatively appears, that the note in question was transferred to the Receiver of the First National Bank of Little Rock by the Receiver of the McCarthy-Joyce Co. in part payment of the preferred indebtedness of the Bank against the McCarthy-Joyce Co. The endorsement on the note also shows that this transfer was made before maturity, and no allegation appears in the answer that it was not so transferred.

Such transfer being in the ordinary course of business in like cases, made the Bank an innocent holder of the note for value. It is argued, however, that the Bank, or its receiver, was not such innocent purchaser for value, for the reason that no direct allegation to this effect appears in the petition. The petition is in the ordinary form prescribed by the Code, Section 5086 Revised Statutes of Ohio (old Section 122), which is as follows:

> "What is sufficient pleading upon instrument for payment of money only. In an action, counter-claim or set-off, founded upon an account, or upon an instrument, for the unconditional payment of money only, it shall be sufficient for a party to set forth a copy of the account or instrument, with all credits and indorsements thereon, and to state that there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest; and when others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties, it shall be necessary to state the facts which fix their liability."

This form has been repeatedly held good by the Supreme Court of Ohio as an allegation of the transfer for value to a *bona fide* endorsee.

"In an action on a promissory note, where the petition is in the form prescribed in section 122 of the Code, whether the plaintiff is an original party to the note or not, the extrinsic facts, which show his right or title to the note, need not be expressly averred. The allegation of title is implied, by force of the statute, in the statement that there is due to him a specific amount on the note which he claims."

Sargent v. *Railroad Company*, 32 Ohio State, 449.

"In order, therefore, to secure the protection afforded to the bona fide endorsee of such an instrument before maturity, by a party who pleads under section 122, it is necessary to give a copy of the endorsement relied on in the pleadings."

Tisen v. *Hanford*, 31 Ohio State, 193.

Such copy of the endorsement is set out in the petition herein.

"There is always a presumption, when the payee's or an endorser's name is endorsed upon the bill or note, that it was done before maturity, and likewise a presumption that the holder acquired the instrument before maturity, whether the legal title be transferable by endorsement or by delivery merely."

Daniel on Negotiable Instruments, section 784.

If, as we claim, the allegations of the petition and amended answer, taken together, show that the defendant in error was an innocent holder of the note, for value, then the facts alleged constitute no defense against his action, and whatever rights the plaintiff in error may have as against the original payee or endorser of the note, if he had any such rights, he must pursue them against such payee or endorser. The rule upon this subject is too well settled to need citation.

But it is argued that defendant in error, having notice of the alleged facts set up in the amended answer, is not such innocent holder for value, and that Joyce, as surety, is enti-

tled to relief because of such alleged notice, and because of the facts set out.

In order to defeat the action of the Bank's receiver, Joyce, as surety, must allege and prove, either that by some affirmative act of defendant in error as endorsee he has been deprived of some remedy as against his principal, or that conditions precedent to his undertaking the contract of suretyship, which conditions were known to the endorsee, the bank, and without which conditions he would not have entered into the contract of suretyship, have been broken. These conditions must have been in the nature of an agreement or contract by and between Joyce and James E. Joyce & Co., the maker of the note, and the payee thereof, the receiver of the McCarthy-Joyce Co. The amended answer discloses no such state of facts, and no agreement or contract of any kind between Joyce and James E. Joyce & Co., as principals, and Whittemore as receiver, or either of them, at or before the time Joyce signed as surety is set out. A close analysis of the amended answer shows that the only facts brought to the attention of the endorsee were that there was an order of the Court to Whittemore as receiver, made before the execution of the note, in addition to obtaining a surety thereon, to retain a lien upon certain property; that this order was known to the bank; that it was not carried out by the receiver; that had it been carried out, the property upon which the lien was directed to be reserved was sufficient to pay the note, and the further alleged fact that Joyce relied upon the receiver carrying out said order of the Court. It is not asserted that the failure of the receiver to carry out the order was at the instance of or in any way attributable to any act of the defendant in error or to James E. Joyce & Co., the principal upon the note. It is not alleged that Joyce would not have signed the note as surety save for such order of the Court. It is not alleged that he agreed to become

surety upon an understanding or agreement, either with James E. Joyce & Co., the principal, or with Whittemore, receiver, that such order would be carried out. The only allegation made is that he believed it would be carried out, and believed that he would be protected thereby. Defendant in error is responsible neither for his belief, nor for his understanding, nor is he responsible for any failure or neglect of Whittemore, as receiver, to faithfully carry out the orders of the Court appointing him.

By attaching his signature to the note and delivering it to the principal maker, James E. Joyce & Co., without any conditions stipulated therein other than the absolute contract of suretyship as evidenced by his signature, plaintiff in error in effect gave credit to the note as and for an absolute promise of payment unconditional and without any notice, either to the payee or to the subsequent endorsees, of any stipulation or agreement not contained in the paper itself.

If, as a part of his agreement, the contract was that the alleged lien should be perfected before his promise to pay it became effective, it was his duty to see that it was so perfected. The note was given in payment for certain personal and real property, and ought not to have been delivered, and we may infer from the pleadings was not delivered, until the property had been transferred. Plaintiff in error, if he put the note in the hands of the principal maker to be delivered to the original payee upon the receipt of the property by the principal maker from the original payee, without any express restriction or condition, may be held to have consented to whatever his principal consented in the absence of fraud. He should not have permitted a deed which omitted the reservation of a lien upon the real estate to be accepted without such reservation, unless he intended to waive the lien. No fraud or deception is alleged, nor is it alleged that the note was delivered to the payee without the consent of

Joyce. The object of the Court in Arkansas in ordering the receiver to retain a lien on the real estate in addition to obtaining personal security for the note, was not thereby to protect the sureties, nor to preserve to them any rights, but was solely intended to protect the estate in the hands of the receiver, to-wit, the rights of the creditors of the McCarthy-Joyce Company. Neither the Court nor the receiver was the guardian of the sureties. It is their duty to look out for themselves. The orders of the Court are at all times under its own control, and may be modified in any way or manner the Court sees fit so long as vested and guaranteed rights are not interfered with. The Arkansas Chancery Court, had a right, at any time if it regarded the security for the funds sufficient, to order the release of any lien, and from all that appears in the pleadings, it may have done so in this case.

As illustrating our position in regard to plaintiff's liability we refer the Court to the following cases:

"1. *Negotiable Note—Notice.*

"One who receives a negotiable note, in the ordinary course of business, for a valuable consideration, executed by two or more, but with the understanding of the makers between themselves that it should not be delivered to the payee unless the signature of a third party was procured, can enforce its collection against those who signed it unaffected by any such understanding, of which he had no notice."

Davis v. *Gray*, 61 Texas, 506.

"*By the Court:* The note, made the foundation of this action is negotiable in form, bears no evidence on its face that it was ever expected to be signed by other persons than Turner and Co. and J. S. Davis, the appellant, and, if the averments of the answer are taken as true, was delivered by Turner & Company to Gray, in the ordinary course of business, for a valuable considera-

tion. This being true, it must be held that any agreement between Turner & Company and Davis, to the effect that the note should not be used unless Ellison & Kyle also signed it as sureties, cannot defeat the right of the plaintiff to recover on the note, unless it be shown that he had notice of the agreement between Turner & Company and Davis. The signing and delivery of the note by Davis to Turner enabled the latter to deliver it to Gray, who, in the absence of notice to the contrary, might rely upon the intention of all the parties whose signature was on it, to make with him the contract which the note evidenced. Brandt on Suretyship, 354–5; *State* v. *Potter*, 63 Mo., 212; *Russell* v. *Freer*, 56 N. Y., 67; 10 Lea Tenn., 124—*Jordan* v. *Jordan*.

"The only inquiry, then, in the case, is, does the answer aver such facts as would amount to notice to Gray of the intention of Davis not to be bound by the note unless Ellison and Kyle also signed it as sureties; such facts as would put a prudent man upon inquiry? We are of the opinion that the answer did not state such facts. It alleges that Hutchinson prepared the note and was to pass on the sufficiency of the surety for Gray; that Hutchinson proposed to take a note signed by Turner and Company, with Davis, Ellison and Kyle as sureties, that Turner took the note and signed it for his firm and also procured the signature of Davis thereto; that Ellison and Kyle declined to sign the note as sureties, after which Turner returned with the note to Hutchinson and informed him that the matter could not be consummated because Ellison and Kyle had refused to sign the note, whereupon Hutchinson proposed to receive the note as it then stood, to which Turner agreed and delivered the note, so far as it appears from the answer, without notifying Hutchinson of the fact that Davis had consented to be bound only in the event that Ellison and Kyle signed the note as sureties. *Facts thus stated were not sufficient as averments of notice to Gray;* for it cannot be presumed that Hutchinson had any knowledge of the agreement between Turner and Davis; and in the absence of something in the answer equivalent to an averment of that fact, it presented no defense to the action, and the Court below properly so ruled."

"P. signed a joint and several note, with G. as his surety, payable to a bank, but with the agreement between him and G. that the latter was not to use the note unless he obtained another surety on it. In violation of the agreement, G. procured the note to be discounted at the bank.

"Held, that this constituted no defence for P. on the note unless the officers or directors of the bank were aware of such an agreement."

The Passumpsic Bank v. *Elmer Goss et al.*, 31 Vermont, p. 315.

"*By the Court.* As between the plaintiffs and Page, who ought to be responsible for Goss' violation of his agreement with Page, that he would not use the note, unless Brown should be procured to sign it as co-surety?

"In the first place it is to be remarked that Page alone was in privity with Goss, so far as that agreement is concerned. In view of that fact, common principles would indicate that Page should stand responsible for the confidence reposed in Goss. The plaintiffs trusted to the paper, which was genuine and apparently perfected for the purpose intended to be served by it. They were not called upon to exercise any personal confidence as to any thing beyond the genuineness of the paper and the responsibility of the signers. See 12 Vermont 219, 222 and 348.

"If the case be considered with reference to the existing equities, it can hardly admit of doubt that they are with the plaintiffs; they have parted with their money in good faith upon paper that Page entrusted with Goss for the very purpose of enabling him to obtain that money of the plaintiffs and in a condition to enable him to use it for that purpose, without exciting any suspicion or suggesting any query as to the right to use it.

"If Page would have shielded himself from liability on that paper, as it was when he thus entrusted it to Goss, a practical and proper sense of fair dealing would seem to be that in some way he should have put the plaintiffs on their guard against taking it unless it should have been signed by Brown.

"In accordance with this view is an old and very uniform doctrine of the law that where through the fraudulent act of the third person one of two innocent parties must suffer, he who hath clothed that third person with the means of perpetrating that fraud must bear the loss. 4. N. H., 455; 15 East 442; 26 Vt. 112."

"It is no defense for the indorser of a note, that he endorsed it upon the express condition that it should also be indorsed by another person, where it does not appear that the indorsee knew the condition."

Bank of Missouri v. *Phillips*, 17 Mo. 29.

"It is no defense to an action by the indorsee of a note against the indorser, that the note was indorsed by the defendant without consideration, for the accomodation of the payee, and delivered to him for the purpose of being used to take up another note of the same parties, but that instead thereof, the payee passed the note to the plaintiff before its maturity, as collateral security for a pre-existing debt; unless it be shown also that the plaintiff knew of the special purpose for which the note was delivered to the payee."

Stoddard v *Kimball*, 4th Cushing, 604.

"*By the Court.* The case discloses no evidence tending to show that the plaintiff knew that the note was delivered by the defendant to Kelly and Reed, for the special and sole purpose of taking up another, and was by them, in violation of that trust, applied to a different purpose. The note was not over-due; on the contrary, it had several months to run, bore no evidence of being dishonored, and was taken by the plaintiffs for the valuable consideration, on giving up another available security. The facts relied on without proof affecting the plaintiff with notice of them, cannot, we think, be a ground of defense."

"1. When a security signs and delivers to his principal a negotiable note, under the condition that it shall not be delivered to the payee, or negotiated elsewhere, until some other person shall also sign the same as co-surety, and there is nothing on the face of the paper indicating that any other co-surety is expected to become

party to the instrument, and no fact is brought to the knowledge of the payee before he accepts the same, calculated to put him on his guard or which should induce inquiry, in such case the surety will be bound.

"2. The surety places the instrument perfect upon its face and before it is due, in the hands of the proper person to pass it to the payee, and the law justly holds that the apparent authority, with which the surety has clothed him, shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the purchaser of the paper, therefore the benefits, of such condition shall not avail the surety."

Meriam v. *Rockwood*, 47th New Hampshire, p. 81.

"1. If a surety signs and delivers to his principal an instrument perfect upon its face, with a condition that it shall not be delivered to the obligee, payee, or grantee, until some other persons who are agreed upon shall also execute the same, and the principal delivers the instrument without regard to the condition, and the obligee, payee, or grantee, has no knowledge of the condition, the delivery will bind the surety.

"2. A executed his promissory note payable to the order of B., and induced C. and D. to sign the note as sureties and re-deliver it to him, A., upon the promise that he would procure other persons named by them, also to execute said note. In disregard of his promise, A. delivered the note to B. without procuring the additional sureties agreed upon.

"Held, that the delivery to B. was absolute, and that the sureties were liable without regard to the condition."

Deardorff v. *Foresman*, 24 Indiana, 481.

"*By the Court:* It was also held in Taylor and Company v. Craig, 2 J. J. Marshall, 449, that a conditional delivery of a promissory note, by a surety in the note to his principal, did not make the instrument an escrow, but the plaintiff had the right to hold the surety responsible without regard to the condition he had imposed upon the principal at the time of delivery. *The Bank of the Commonwealth* v. *Curry*, 2 Dana, 142, recognizes this as law * * * * *

"The surety places the instrument, perfect upon its face, in the hands of the proper person to pass it to the obligee, and the law justly holds that the apparent authority with which the surety has clothed him shall be regarded as the real authority, and as the condition imposed upon the delivery was unknown to the obligee, therefore the benefit of such condition should not avail the surety."

"It appears to be well settled, both by reason and by authority, that where one or two innocent persons must suffer by the fraud of a third person, he who entrusts the third person and places the means in his hands to commit the wrong must bear the loss. * * * * The wrong here was one which Brigg's vigilant regard for his own interest and safety could and should have avoided. In the case of the *Bank of St. Clairsville* against *Smith et al.*, 5th Ohio, page 222, the supreme court of this state held: that when a loss must be sustained by one of two persons through the fault of the third party in passing negotiable paper he who reposes the first confidence must bear the ultimate loss."

Selter v. *Brock*, 3rd Ohio State, page 308.

We call the special attention of the Court to the case of *Wornell et al.* v. *Williams, Administrator*, 19th Texas, 180, as being in all material respects parallel to the one at bar. The syllabus of that case is as follows:

"A plea by the sureties of the purchaser at an administrator's sale, in a suit on the note given for the purchase money, that they become sureties in consideration of the requirement of the statute, and of the order of Court, that a mortgage should be taken on the property by the administrator, to secure the note; that they would not have become such sureties but for that requirement, and the belief and assurance that it would be complied with; and that a mortgage was not taken by the plaintiff, in pursuance of a collusive and fraudulent understanding between the purchaser, who was at the time chief justice of the County, and the plaintiff; and that the purchaser soon afterwards conveyed the property (a slave) to some remote point and sold him; and

that, by the negligent and fraudulent conduct of the plaintiff, the securities required by law and the said order, have been omitted and lessened to the injury and detriment of these defendants. *Held*, to be bad on general demurrer.

"It does not become necessary in this case to inquire whether, in case of actual imposition, practiced upon the sureties of a purchaser at administrator's sale, by the administrator, in not taking a lien upon the property to secure the payment of the note given for the purchase money, they would be entitled to relief, as against the estate, or would be turned over to their recourse upon the administrator, personally for the redress of any injury they may have sustained."

The facts found by the Court were, that suit was brought by the appellee against the appellants on a joint and several promissory note signed by appellants, appellants pleading: "that the note sued on and set out in said petition was made and given by one James E. Glasscock, as principal, and these defendants as sureties for said Glasscock; that the consideration of said note, as is expressed therein, was a negro slave, named Samuel, belonging to the estate of Joseph and Martha Williams, the plaintiff's intestates; that said slave was sold by the plaintiff, in obedience to an order of the County Court of Rusk, aforesaid, sitting as a Court of Probate, at the November term, 1851; and that, at the sale, the said Glasscock became the purchaser of said slave for the amount of said note. Further answering, these defendants say, that the said order of sale directed the plaintiff to sell the slaves therein mentioned, upon a credit of twelve months; that he should take from the purchasers thereof two good sureties, as well as mortgages upon the property, as is provided by the statute in such cases made; and that said plaintiff failed, neglected and refused to take the required mortgage upon the said slave Samuel from the said Glasscock. Further answering, these defendants say, that they became sureties to

the note aforesaid, in consideration of the requirement made by the statute and said order that a mortgage should be taken upon the said slave; and they would not have become sureties but for that requirement, and the belief and assurance that it would be complied with. Further answering, these defendants say, that said Glasscock, at the time said order was made, and at the time of said sale and the confirmation thereof, was chief justice for the said County of Rusk; that they are informed, and believe, that the said mortgage was not taken by the plaintiff, in pursuance of a collusive and fraudulent understanding between the said Glasscock and the plaintiff; that said Glasscock, soon after his said purchase, conveyed said slave to some remote point and sold him; and that, by the negligent and fraudulent conduct of the plaintiff, the securities, required by law and the said order, have been omitted and lessened, to the injury and detriment of these defendants."

A general demurrer to this pleading was sustained in the Court below, and upon error the Supreme Court of Texas affirmed the decision of the lower Court. We quote the opinion of the Court in full:

> "WHEELER, J. The question is, whether there was error in the ruling of the Court sustaining exceptions to the plea, and excluding evidence in support of it; and we are of opinion there was not. The substantive matter of the plea is, that the defendants became sureties for the purchaser of the property, in the expectation and confidence that the administrator would perform his duty to the estate he represented, in taking the mortgage security required by law and the order of the Probate Court. There is no allegation that they were deceived or induced to become sureties by any false promise or representations of the plaintiff, or that any actual fraud was practiced upon them. There is a charge of fraudulent combination between the plaintiff and the purchaser, but whether it was for the purpose of defrauding the estate or the defendants, or whether it was intended or had the effect to deceive or injure any one,

is not alleged. There is no allegation of any actual deception, imposition or fraud practiced upon the defendants. The only ground for relief really disclosed by the plea is that the plaintiff did not perform his duty by taking the required additional security. The taking of that security should have been contemporaneous with the taking of the note upon which the defendants became sureties. (Hart. Dig., Art. 1181.) If they intended to become such only upon the taking of the mortgage upon the property, it became them, before giving their note, to see that the mortgage security was taken. There was nothing to prevent them from doing so. If, instead of taking that precaution, they saw fit to trust to the prudence and discretion of the administrator, the estate he represents cannot be made to bear the consequence of the want of their vigilance and care. They cannot make a hardship, against which they had ample power and opportunity to provide, a ground to relieve them from their obligation to the estate. On this ground, it is clear, the Court rightly adjudged the plea insufficient. It does not become necessary in this case to inquire whether, in case of actual imposition practiced upon them by the administrator, they would have been entitled to relief as against the estate, or would have been turned over to their recourse upon the administrator, personally, for the redress of any injury they may have sustained. That question may be considered when its decision becomes necessary. For the disposition of the present case it will suffice to say, the exceptions to the plea were rightly sustained, and consequently the evidence offered in support of it was properly excluded, and there is no error in the judgment.

"Judgment affirmed."

The answer in that case alleged as a defense all of the matters set up by Joyce in his amended answer herein, and alleged in addition that the sureties would not have signed the note but for the requirement of the statute of Texas, which was similar to that of the Arkansas statute, and their belief and the assurance to them that the requirements of that statute would be complied with. Even were this action an action by the payee of the note Whittemore against

Joyce, instead of an action brought by an innocent holder of the note, the facts alleged by Joyce would not, in our opinion, constitute a defense. The most that can be claimed from the allegations is that Whittemore, as receiver, was guilty of *laches* in not taking all of the security provided for by the order of the Court. The doctrine is well settled that mere *laches* on the part of a creditor will not deprive him of his action against the surety.

> "It is perfectly well settled, and has been very properly conceded in the argument, that a surety is not absolved by the want of diligence on the part of the creditor in regard to his demand against the principal debtor. A defense on the ground of mere *laches* would indeed be inconsistent with the relation of the parties. The obligation to pay is not in the event of the liability or unwillingness of the principal, but at all events, and under all circumstances, as much so as if he were the sole debtor. Such is the form of his obligation (unless specially qualified,) whether separate or joint, and such is the true intent and meaning; and it is founded upon a lawful and sufficient consideration, the credit given to the principal by his procurement."
>
> *Humphrey* v. *Hitt*, 6th Grattan, page 523.

> "But the delivery of the fi. fa., to the sheriff is not security for the debt. It is only a step in the prosecution of the demand by legal process, as is equally true of the institution of the suit, or recovery of the judgment, and the issuing of the execution. And as the creditor owes to the surety no debt of active diligence, he may omit to bring suit, or dismiss it after it is brought; or after recovery of judgment, he may decline suing out execution, or to place it in the hands of the sheriff, or to cause it to be levied, or he may direct it to be levied only in a certain event. And why may he not recall or suspend the execution before it has been levied? In what respect does that differ substantially from any other negligent, or injudicious, or indulgent prosecution of his demand?"
>
> *Humphrey* v. *Hitt*, 6th Grattan, page 526.

"The delivery of the execution to the sheriff, is not, properly speaking, a lien upon goods of the debtor; it is the levy which makes the lien; that, it is true, has relation, to some extent (i. e., as against *mesne* purchasers, but not as against other execution creditors,) to the delivery to the sheriff, but in like manner, and to like effect, and upon the same policy that the judgment lien on lands has relation to the first day of the term. There can be no relation of the judgment lien without a judgment, and so there can be no relation of a levy without a levy.

"If the creditor, by recalling or suspending an execution against a principal debtor, which has come to the hands of the sheriff, violates the rights of the surety, it cannot be because he thereby releases a security for the debt which he had obtained from the principal; but because he has failed to obtain such a security by a due course of proceeding; and that would be requiring of him an active and judicious diligence in the prosecution of his demand. And such required diligence would on the other hand encourage supineness and negligence on the part of the surety, who instead of performing his duties of paying the debt, or causing it to be paid by his principal, would be tempted to lie in wait for some slip or indiscretion on the part of the creditor, and even to stimulate his principal to solicit from the creditor an imprudent indulgence."

Humphrey v. *Hitt*, *id.*

In *The Farmers' Bank of Canton* v. *Reynolds*, 13 Ohio, 85, the Court held:

"A mere delay to pursue remedies or omission to enforce liens does not operate to discharge the surety. To work his discharge there must be some positive act of relinquishing sureties or release of liens."

In *Dye* v. *Dye*, 21 Ohio State, page 93, DAY, Justice, says:

"A creditor may, however, in many ways do that which, though it may not affect the liability of the principal, will exonerate sureties. In all such cases the discharge of the surety is based on some recognized and well-defined principle, and, in general, results from a

positive act of the creditor which operates to the prejudice of the surety. Passiveness on the part of the creditor will not discharge the surety, unless he omits to do, when required by the surety, what the law or his duty enjoins him to do, or unless he neglects, to the injury of the surety, to discharge his duty in any matter in which he occupies the position of a trustee for the surety."

"The discharge of the surety is not claimed in this case, by reason of any positive act of the creditor, not by reason of his neglect to prosecute the claim, after being required by the surety to do so by notice in writing, in accordance with the statute; nor, indeed, by reason of his neglect to comply with any requirement of the surety whatever, for, from aught that appears, the passiveness of the surety equaled that of the creditor. Nor did the creditor have anything in his hands, actually or constructively, in the nature of a trust. Then, upon the principles already so broadly stated, it would seem that the surety was not exonerated from liability on the note."

Referring to the language of Justice DAY in the present case, it appears that the passiveness of Joyce equaled that of Whittemore, nor did Whittemore have anything in his hands actually or constructively in the nature of a trust for Joyce.

"The withdrawal of an execution from the hands of a sheriff before a levy will not discharge a surety. Nor will an omission to revive a judgment by means of which the lien and the land was lost; nor discontinuance of steps to foreclose a mortgage. Daniel on Negotiable Instruments, Sec. 1311, p. 333; *Humphrey* v. *Hitt*, 6 Grattan, 509; *Sawyer* v. *Bradford*, 6 Ala., 572; *Heatherington* v. *Branch Bank of Mobile*, 14 Ala., 68."

"Mere indulgence to the principal debtor, at the will of the creditor, however long continued, and whatever may be the consequences, will not operate to discharge a surety, and the rule is the same, whether the indulgence is extended towards the principal debtor or towards a third person liable to the creditor upon a collateral security. The plaintiff, as surety for others, executed with them a note to the defendant for $2,000,

payable in one year. One of the principals at the same time assigned to the defendant as collateral security a bond and mortgage for a greater amount against third parties which fell due by successive installments after the maturity of the note. *Held*, That passive neglect of the creditor, there being no request on the part of the surety to enforce the bond and mortgage, afforded no ground to relieve the surety even in equity, although the neglect continued for a long time, and the value of the security was thereby lost. And although the creditor, after waiting two and a half years, commenced, without request, a foreclosure suit upon the bond and mortgage in season to have sold the mortgaged premises under his decree, and then to have docketed the decree for the deficiency, to have acquired a general lien upon property of the mortgagors sufficient to pay the debt or some part thereof, but conducted his proceeding so negligently that before he docketed his decree their property was encumbered by other liens to its full value, and the debt secured by the bond and mortgage became thereby lost; yet *held*, that the plaintiff as surety was entitled to no relief at law or in equity."

Schroeppell v. *Shaw*, 3 N. Y., 416.

"*By the Court:* The ground upon which the plaintiff claims that he is, in equity, entitled to be discharged from his liability, is the alleged gross negligence of the defendant in the collection of the bond and mortgage assigned to him as collateral security for his debt. In the consideration of this question, I shall, at least for the present, assume it to be true, as the plaintiff alleges, that by the exercise of promptness and vigilance, the defendant might have secured the payment of the bond and mortgage and thus have relieved the plaintiff from his liabilitiy. In considering the obligation of the parties to each other, as creditor and surety, it is to be borne in mind that the plaintiff had, by signing the note, guaranteed that his principals should, in one year from the date of the note, pay the amount with interest to the defendant, or that he would himself be liable for its payment. Before the first installment upon the bond and mortgage had become payable, the note had become due, and the plaintiff as well as his principal was in

default. The right of the defendant to *sue the plaintiff for the recovery of the note at any time after it became due will not be denied.* Suppose a suit had been brought and judgment had been recovered, before the alleged default of the defendant in not securing the payment of the bond and mortgage had occurred, can it be pretended that the subsequent neglect of the defendant could have the effect of an equitable discharge of the plaintiff's liability to pay the judgment? It seems to me that to sustain this bill it is necessary to violate one of the cardinal principles of equity. The plaintiff was the party first in default. If he had performed his obligation to the defendant, he would have had control of the bond and mortgage before any part of it became due. There was no time, after the first installment upon the bond and mortgage became due, when the plaintiff was not in default, and liable to be sued for such default. To allow him to take advantage of any want of diligence of the defendant in collecting the bond and mortgage, under such circumstances, seems very much like allowing a man to take advantage of his own wrong. If the defendant was guilty of negligence, the plaintiff was guilty of the positive omission of duty. The defendant was under no higher obligation to collect the bond and mortgage, than the plaintiff was to pay the note and take the bond and mortgage himself.

"But let us consider more attentively what constitutes such gross negligence as will operate to discharge a surety, when he is not himself in default. A surety has an undoubted right, upon the payment of the debt, to have the full benefit of all the collateral securities which a creditor has taken as an additional pledge for his debt. 'It is hardly possible,' said Lord BROUGHAM, in 3rd M. & Keen, 190, 'to put this right of substitution too high.' 'The surety,' says Chancellor KENT, 'by his very character and relation of surety, has an interest, that the security taken from the principal debtor should be dealt with in good faith and held in trust, not only for creditors' security, but for the surety's indemnity. The creditor must do no willful act either to poison it in the first instance, or to destroy or cancel it afterwards.' 'But this qualification should be added,' says STORY, 'that a mere omission by the creditor to collect the debt

due of the hypothecated property, so that it is lost by his *laches*, will not discharge the sureties. The creditor must be guilty of some wrongful act, as by a release, or fraudulent surrender of the pledge in order to discharge the surety.' See 1st Story, Equity, paragraphs 501–639. Thus, it will be seen, that in reference to collateral securities, the rule is the same as in reference to the collection of the debt of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety so long as the surety himself remains inactive. Until the surety moves in the matter, it is enough that the creditor holds himself in readiness to transfer to him, when he applies, all the securities he holds, that he may have the benefit of such securities in aid of his own responsibility. * * * I have thus noticed in detail all the cases cited by the plaintiff's counsel to show that upon the facts presented in this case the plaintiff should be relieved from the payment of the judgment against him, and have examined the principles upon which those cases were decided, that it may be apparent that, in no single instance, has it ever been held that the mere passiveness of the creditor, in the collection of his debt, either of the principal debtor or from collateral securities held by him, is sufficient ground for discharging the surety from his liability. No rule is more uniformly recognized than that mere indulgence at the will of the creditor, however long, or whatever may be the consequences, will not operate to discharge the surety. I think it may be safely added, that this rule is equally applicable whether the indulgence is extended towards the principal debtor or towards a third person liable to the creditor upon a collateral security. The criterion by which to determine in any and every case, whether a creditor has done, or omitted to do, anything which will have the effect to exonerate the surety, is stated, as I think, with perfect accuracy by Judge STORY, as follows:

"If a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act when required by the surety which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defence to any suit

brought against him, if not at law, at all events in equity. 1 Story, equity, par. 325.

"After a very diligent examination of the authorities bearing upon the question, I feel great confidence in asserting that a surety has in no case been held to be discharged by the act or omission of the creditor, where such act or omission has not been within the terms of this rule."

"1st. When the holder of a promissory note receives from the maker a conveyance of certain property as collateral security for the payment of the note, the law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. The surety may at any time after the debt becomes due and owing, discharge it and take the collateral.

"2nd. The rights of the parties are not affected by the fact that the collaterals have depreciated between the time of the maturity of the debt for payment of which they were pledged, and the commencement of suit against the surety."

Brick v. *The Free Hold National Banking Company*, 37 New Jersey Law, page 307.

"*By the Court.* The defendant in this case is sued as endorser of a promissory note. The defense is, that the plaintiffs, the holders of the note, received from the maker a conveyance of certain property as collateral security for the payment of the note, and that because of their failure to sell the collaterals and appropriate the proceeds of the sale to the liquidation of the debt, coupled with the fact that the property held as collateral, had somewhat depreciated in value between the time of the maturity of the note and the commencement of the suit, the right of action as against the defendant, who is an accommodation endorser, is lost. This proposition cannot be maintained. It is well settled that mere delay by the creditor to sue the principal debtor will not discharge the surety, for the obvious reason that the surety may at any time discharge his obligation to the creditor, and thus make the principal his debtor. The same rule holds when collaterals are pledged by the principal debtor. The surety may at any time after the debt

becomes due and owing, discharge it and take the collaterals. The law implies no contract on the part of the creditor to proceed on the collaterals before he can sue the surety. Nor are the rights of the parties affected by the fact that the collaterals have depreciated between the time of the maturity of the debt, for payment of which they were pledged, and the commencement of suit against the surety. These principles are recognized as sound law by the Court of Appeals in New York and in the well considered case of *Schroeppell* v. *Shaw*, reported in 3rd New York, 446."

"Mere forebearance by the creditor to the principal, however prejudicial to the surety will not discharge the surety."

1st sec. syllabus *Pitts. Ft. Wayne & Chicago Railway Company* v. *Shaeffer*, 59 Pa. St., 350."

"Mere *laches* on the part of the obligee or creditor, for non-performance of some act which might prevent loss to the surety will not, in the absence of some express covenant or condition, discharge a surety. To be available to him as a defence, the neglect must be of some positive duty owing to him."

1st sec. syllabus in *Board of Supervisors of County of Monroe* against *Otis*. 62 N. Y., 88.

"*By the Court.* Judge Gardner, the learned referee in this case, suggests what seems to be the true rule as between sureties and obligees, that mere passive negligence or *laches* of the obligee or creditor, mere non-performance of some affirmative act, which if performed might prevent loss to the surety, will not, in the absence of some express covenant or condition to that effect, discharge a surety, and that the neglect of duty which is available as a defense for a surety, must be of some duty owing to the surety, and not to others; some positive duty undertaken in behalf of, and for the benefit of the surety. * * * * * It was held by this Court in *McKechnie* against *Ward*, 58 N. Y., 341, decided in October, 1874, following the unbroken current of authorities, that the surety was not discharged by mere non-action of the creditor, or his omission to take measures for collection of the debt from the principal.

"A creditor who lets the means of satisfaction slip from his hands, discharges his debtor's surety, but he must have the means actually in his hands, or at least a specific lien on it. Permissive supineness will not do it. In the *United States* v. *Simpson*, 3 Penn. Rep., 459, the surety was not discharged, though the creditor had suffered the lien of the judgment against the principal to expire. That was thought to be a different thing from impairing a security by a positive act, the surety and the creditor standing in equal want of equity. Had the surety in this instance required the creditor to proceed on his execution, the case would have been different, but it was his business to look after his own interest. *Morrison* v. *Hartman*, 2nd Harris, p. 56."

See also:

Thompson v. *Hall*, 45 Barb., 214.
U. S. v. *Simpson*, 3 P. & W., 437.
Kindt's Appeal, 102 Pa. St., 441.
Winton v. *Little*, 94 Pa. St., 64.
Mundhorff v. *Singer*, 5 W., 172.
Allen v. *Brown*, 124 Mass., 77.
Hunt v. *Brigham*, 2 Pick, 581.
Horne v. *Bodwell*, 5 Gray, 457.
Deal v. *Cochran*, 66 N. C., 269.
Camp v. *Boswick*, 20 Ohio St., 337.

The pleadings herein show that there was abundant opportunity for Joyce, using ordinary diligence, to have protected himself. He could have paid the note when due and proceeded against his principal. The note became due in March, 1896. The answer shows that James E. Joyce and Company, in July, 1897, over a year after the note had become due, still held a part of the real estate upon which it is claimed the receivers should have retained a lien, and upon his own statement he could have enforced his rights against such real estate. If he has suffered at all, he has suffered by his own negligence in not seeing to it that the receiver carried

out the order of the Court and if any negligence is chargeable to the receiver, his remedy is against the receiver as well as his bondsmen individually.

Considering now some of the cases cited by counsel for plaintiff in error we find :

The language of the syllabus in the case of *Hickok* v. *Farmer's Bank*, 35 Vermont, 476, differs so very materially from the construction put upon it in plaintiff's Brief that we desire to call attention to it.

> "An assurance given by the payee of a promissory note to the surety thereof, at the time of its delivery, without which assurance the surety would not have signed the note, that if not paid at maturity the payee would immediately proceed to collect it out of the principal, accompanied by the fact that the payee suffered the note to remain unpaid for more than a year after its maturity without taking any steps to collect it, or notifying the surety of its non-payment, until after the failure of the principal, notwithstanding it might during that time have been collected of the principal, and the further fact that the principal relied on this assurance, and in consequence thereof omitted to take measures to secure himself, constitute an equitable estoppel against the enforcement of the note against the surety, and relief will be granted him in that respect by the Court of equity."

The plaintiff in error does not claim that any assurance was given him by the payee of the note he signed as surety at the time of its delivery, or at any other time, without which assurance he would not have signed the note.

In *Jones* v. *Kerr*, 30 Georgia, 93, the bill alleges that Jones & Cox were induced to become sureties for one A. J. Williams on a promissory note, payable to Kerr & Hope, which note was given in lieu of, or payment of, *fi. fa.* held by Kerr & Hope against Williams, and was signed by said Jones & Cox as his securities under the agreement, and upon the condition that said *fi. fa.* should be assigned by said Kerr & Hope to them.

The Supreme Court of Georgia therein held:

> "If a plaintiff in a *fi. fa.*, taking a new note for his judgment debt, with security, undertake to deliver the original execution to the securities for their indemnity, and fail to do it, and who in consequence thereof lose the money, they are entitled to their discharge."

The facts in this case bear not even the slightest resemblance to the facts in that case, nor can the declaration of the law by that Court have any application to this case.

In *Burr* v. *Boyer*, 2 Neb., 265, we cheerfully quote from the opinion of the Court:

> "From what has been said, it will be understood that any liability which might fall upon the plaintiff in the premises would result from his omission to file the mortgage, rather than from any failure to satisfy his claims out of the mortgaged property."
>
> "This latter he was not bound to do upon his own motion. Story Eq. Jur., Sec. 501. His duty, in the first instance, was to make effectual the security given, to preserve it, to await the maturity of the note. Then the duty of the defendant Boyer arose. It was for him then to pay the note, unless the conduct of Burr had destroyed the security on which he was entitled to rely. But from all that appears here at that time the property may have been intact and in possession of Mitchell. It is claimed now, nearly one year after the defendant Boyer's obligation arose, that the property is disposed of. It does not follow, nor is it at all probable, that such was the case at the time when he, under the law of his contract, should have paid the note. If it is the fact, it was the duty of the defendant in the Court below to make it appear. The final presumption is to the contrary, however, but the defendant cannot go into a Court and invoke aid of a rule of law granted in equity; he must not only show that the plaintiff has been guilty of the wrong, but that he himself is free from fault. For this reason the first defense is insufficient."

This language seems most appropriate to the facts as they appear in the answers of the defendant in the Court below, and would justify sustaining the demurrers to the same even if the action were between Joyce and the original payee of the note sued on.

In the case of *The City Bank* v. *Young*, 43d New Hampshire, 457, the principal had given the mortgage to the bank as collateral security for the note, and the bank had subsequently placed the property in the hands of the mortgagor, who was the principal of the note, and permitted him to sell the same. He was then insolvent, and appropriated the greater part of the proceeds. Under such circumstances the Court properly held, when a creditor disposed of personal property mortgaged to him by the principal as collateral security, he is responsible to the surety for ordinary care and prudence in the sale and the application of the proceeds.

In *Wulff & Billing* v. *Jay*, 7 Queen's Bench, page 761, COCKBURN, C. J., says:

> "This is an action brought against the defendant, as surety. It appears that as part of the transaction between the principal creditors and the debtors, there was to be a mortgage of the plant, fixtures, and things upon the debtor's premises, by bill of sale as security for the principal debt. The debtors were to remain in possession of the things thus mortgaged until default, and the creditors were to have power, in the event of the default in the payment of the installments of the debt, which were to be paid until the bill of sale, or in the event of the interest, which was to accrue from time to time, not being paid, to enter and sell the things thus assigned, upon giving a month's notice."
>
> "Now it appears that in the month of February, interest first became due, and that the interest was not paid, and it remained unpaid until the month of August, when the debtors became bankrupt. It further appears that the insolvent condition of the debtor's affairs was plain, and that bankruptcy was imminent and had been impending for some time before it actually took place;

and it further appears that one of the creditors was cognizant of that fact, and was afterwards, and when the bankruptcy took place, solicitor to the proceedings in the bankruptcy, and was therefore perfectly aware of the bankruptcy being imminent, notwithstanding he took no steps to protect the bill of sale by registration, or to enter and take possession of the effects."

It was *held:*

"That the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, deprived themselves of the power to assign the security to the surety, and that owing to their *laches* he was discharged to the amount that the goods were worth."

The above case differs from the one under consideration in this, besides the action being between original parties to the note, it appears that the mortgage for the security of the principal debt was actually given to the creditors; that default was made in the payment of interest on the note; that the principal creditor neglected to avail himself of the express provisions of the mortgage to secure his debt; that he was guilty of this neglect knowing that the principal debtor was insolvent. Whereas, there is no averment in the answer to which we have demurred, of the insolvency of the principal maker of the note, nor of the inability of said maker to have paid the note to the surety at any time after it became due, if he had performed his duties and paid the note, and promptly proceeded against the maker.

In the case cited from 6th Heiskell, 2, *Gillespie* v. *Darwin*, the Court decided upon the following state of facts:

"*Principal and surety: Payment.* A was the maker, and B the surety, of the note held by C. A died, and his administrator, having suggested the insolvency of his estate, filed a bill in the Chancery Court to remove the administration to that Court, and to have a sufficiency of the land sold to pay the debts, an order was made and published requiring creditors to file their

claims. Thereupon C filed his note with the clerk and master. A portion of the land was sold by decree of the Court, and a fund sufficient to pay all debts collected before the war. C did not demand payment of the clerk, and nothing was paid upon his note; but after the war he sued B, as surety. Held, that the surety was discharged."

In the next case cited, *Watts* v. *Shuttleworth*, 5 Hurdlestone and Norman, 235, the full quotation is as follows:

"By articles of agreement, H. agreed with W. (the plaintiff) to complete certain fittings for a warehouse for 3,450 pounds, to be paid by installments during the progress of the work. This contract contained a stipulation: 'That W. (the plaintiff) shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, *and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract.*' By agreement recited in part in the contract, the defendant agreed with the plaintiff to guaranty the due performance of the works by H. The agreement was to be signed, and was in fact signed, at the office of the architects, and the defendant stated that a clerk of the architects told him that he incurred no risk in consequence of the stipulation as to the insurance, and that therefore he signed the guaranty. The plaintiff advanced 1,800 pounds to H., during the progress of the work, after which the fittings to be valued at 2,300 pounds, while still unfinished, were destroyed by accidental fire in the wareshop of H. The plaintiff had not insured the fittings. H. became insolvent and never repaid the 1,800 pounds, or any part of it. The plaintiff was compelled to pay a sum greater by 241 pounds than the original contract price, to another person to complete the work contracted for."

Upon such a state of facts the Court held:

"That the plaintiff ought to have insured the fittings, and having omitted to do that which his duty toward the defendant required him to do, and which, if he had done, the defendant would have been relieved to the extent of the insurance, the defendant was discharged."

The case in the 14th American Reports, page 389, is one wherein the suit was upon the official bond of one Hoyle, as Treasurer of Lynn County. One of the sureties, Bealls, signed the bond on the condition that the principal would also procure the signature of L. thereto as surety, and that he was to retain the bond in his hand as an escrow, unless the other party should also execute it as security. Hoyle never procured the signature of L., whose name was signed to the bond without his knowledge or consent, and the bond was delivered to Lynn County without the knowledge or consent of the defendant, Bealls. The Court says:

> "When a principal, not acting as agent of the creditor, fraudulently procures the execution of a bond by sureties, the remedy of the sureties in such case is against the principal, and not the creditor who did not participate in the fraud. But this is not at all that case. Here there was no valid execution of the bond at all. The delivery was conditional, and it could not become the bond of the surety till this condition was performed."

Holt v. *Bodet*, 18 Pa. State, 107, is a case wherein the assignee of a bond upon which he had judgment entered, released from its lien real estate of the principal debtor, thereby discharging the surety to the extent of the value of the property so released.

Cummings v. *Little*, 45 Maine, 187, is one in which the payee of promissory notes held a mortgage over one of the defendants upon personal property, and afterwards, without consulting the other defendants, who were in fact sureties on the notes, he discharged the mortgage. And *Baker* v. *Briggs*, 19th American Decisions, 311, is the same kind of a case.

In every case cited by the plaintiff in error, which seems favorable to him, there was a positive act of the creditor in the parting with legal or equitable securities which the latter might have held for the benefit and protection of the surety. Such a state of facts is not presented in the answers in this case.

ARGUMENT.

SECOND DEFENSE.

This defense is, that the First National Bank of Little Rock, at the time of the assignment of the McCarthy-Joyce Company, of all its real and personal estate to the said C. H. Whittemore, had in its possession for collection some sixteen promissory notes that had been given to the McCarthy-Joyce Company, and that the Bank was a preferred creditor of the McCarthy-Joyce Company to a large amount. The claim of Joyce, plaintiff in error, is, that these notes were included in the inventory and order of sale, and constituted a part of the consideration for which the note sued on herein was given; that he, Joyce, signed said note as surety upon the understanding and faith that the said receiver of the McCarthy-Joyce Company would deliver to the principal maker of said note these sixteen promissory notes along with the other personal and real property. He further claims that these sixteen notes, although they amounted in the aggregate to only $11,000, were sufficient in value to pay the note herein sued upon, amounting to $9,000 and interest, as well as the other note given for a part of the deferred payments, amounting to $9,000, and interest; that the First National Bank of Arkansas, and the said Sterling R. Cockrill as Receiver thereof, have wrongfully and illegally refused to deliver said notes or the proceeds of such as have been collected to the said James E. Joyce & Co. The essence of this defense is, that by the alleged wrongful withholding of these sixteen promissory notes from the principal maker of the note sued on herein, the consideration therefor has failed, and that he, Joyce, as surety thereon, is thus discharged from his obligation. The amended answer filed herein shows that these sixteen promissory notes were never in the possession of Whittemore as Receiver of the McCarthy-Joyce Company

and that the note herein sued upon was given in part payment for real estate, personal property and choses in action which were in his hands of the value of $38,000. It is impossible to discover the method by which plaintiff in error separates these particular sixteeen promissory notes from the great mass of property conveyed at that time, and by what method he fixes them as the sole consideration for the note upon which he is sued herein. How then, can it be correctly said, "A consideration of the note in controversy has failed?" "A partial failure of the consideration is a good defense *pro tanto*, but such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part can be availed to by way of defense."

Daniel on Negotiable Instruments, Vol. 1, p. 203.

While the amended answer admits that these sixteen promissory notes were in the possession of the First National Bank of Little Rock, Arkansas, for collection, "said Bank being a preferred creditor of the McCarthy-Joyce Company for a large amount at that time," no claim is made that said indebtedness to the Bank has ever been paid. Hence, it is admitted to be still outstanding against any collections that may be made on the said sixteen promissory notes. The Bank had and still has a lien upon them for the indebtedness due it from the McCarthy-Joyce Company. It is doubtful whether this defense was intended to be taken seriously, especially as counsel for plaintiff in error must have known that the question involved therein has already been determined adversely to the principal maker of the note sued on herein, in the highest Court of the State of Arkansas before the amended answer was drawn. See

Cockrill v. *Joyce*, 62 Ark., p. 216.

It is not denied that the note sued upon herein came into the hands of the defendant in error by purchase for full value before maturity, in the due course of business and in good faith. These elements are all that was necessary to entitle the holder to the immunities granted by the law merchant.

> "The failure of consideration, like want of consideration, is no defense to commercial paper in the hands of a *bona fide* holder for value."
>
> 2d Randolph on Commercial Paper, Sec. 557, and authorities there cited.

> "In an action by a *bona fide* holder of a note taken before due against the maker, the consideration cannot be inquired into if the instrument be not in its creation void."
>
> *Baker & Robinson* v. *R. & H. Arnold*, 3 Kaines, 279.

> "But the want of consideration, or the failure thereof, can not be pleaded in a suit brought by an indorsee against the maker of a note, by an indorsee against a prior, but not his immediate indorser, nor by the payee against the acceptor of a bill, as a general rule. They are regarded as remote parties to each other, and between such parties two distinct considerations must be inquired into in order to perfect a defense against the holder. First, a consideration which the defendant received for his liability; and second, that which the plaintiff gave for his title. And if any intermediate holder gave value for the instrument, that intervening consideration will sustain plaintiff's title."
>
> Daniel on Negotiable Instruments, 4th Ed. sec. 174, p. 190.
>
> Byle's on Bills, 236.
>
> 1st Parsons Bills and Notes, 192.
>
> *Hoffman* v. *Bank of Milwaukee*, 12 Wallace, 191.

If Joyce, as he says in his amended answer, signed the note herein sued upon for James E. Joyce and Company, as surety, upon the understanding and faith that by this purchase James E. Joyce and Company would obtain title to

notes held by the bank and not within the control of the Court or of its receiver, it was a mistake of his, and for which the bank was at that time in no wise responsible, nor is it in any way responsible now. The receiver of the McCarthy-Joyce Company was not entitled to the possession of these notes. And neither was the James E. Joyce Company until the indebtedness due the bank was paid. The law on this subject is well settled, and is thus stated by a recent writer:

> "A banker has a lien on all securities of his debtor in his hands for the general balance of his accounts unless such a lien is inconsistent with the actual or presumed intention of the parties. A lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account. And so, if the securities be deposited after the credit was given, the banker has a lien for his general balance of account, unless there be an expressed contract, or circumstances that show an implied contract inconsistent with such lien."
>
> 1st Jones on Liens, 2nd Ed. sec. 244.
>
> *Kelley & Co.* v. *Phalen*, 5th Dillon, C. C. R., 228.
>
> *Reynes* v. *Durmont*, 130 N. Y., 392.
>
> *Bank of Metropolis* v. *New England Bank*, 1st Howard, 239.
>
> *Cockrill* v. *Joyce*, 62 Ark., p. 216.

To the latter case we invite the careful attention of the Court, as it not only clears up the question involved in this defense, but also throws some light on the value of the first defense.

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